Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1997

WENDY LEE WILSON and STEVIE BURNS, Petitioners,

v.

LEON "BUDDY" NUTT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

IS THERE INDIVIDUAL LIABILITY FOR SEXUAL HARASSERS UNDER TITLE VII (42 U.S.C. § 2000e(b))?

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OTHER AUTHORITIES

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 22, 1998. No rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

42 U.S.C. §2000e(b)

42 U.S.C. §2000e. **Definitions**
For the purpose of this title -

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. §2000e(b) (1992)

STATEMENT OF THE CASE

In 1992, Wendy Lee Wilson was twenty years old. At age eleven, she was abducted in Wayne County, Tennessee, and raped. Her attacker was arrested, and he is still in prison. In the spring of 1992, Wendy Lee Wilson began working as a dispatcher at the Wayne County Sheriff's Department. She was still a senior in high school and planned to go away to college in the fall. The sheriff's department hired her with the understanding that she would leave her position on July 31 to attend college. **Wilson v. Wayne County**, 856 F. Supp. 1254, at 1256 (M.D. Tenn. 1994).

Leon "Buddy" Nutt was fifty-five years old. He was elected Sheriff of Wayne County in 1990. When Miss Wilson began working at the sheriff's department, Sheriff Nutt knew that she had been raped. He remembered the incident from the time it happened. He also discussed it with other sheriff's department employees, to whom he expressed his belief that Miss Wilson was emotionally disturbed as a result of the rape. **Id.**

Stevie Burns is thirty-three years old. He has worked for the Murray Ohio Manufacturing Company for fifteen years. In October, 1990, he began working part-time as a volunteer "auxiliary officer" for the Wayne County Sheriff's Department. In October, 1991, he was added to the sheriff's department payroll. Mr. Burns started off as a dispatcher and warrant server. However, over time, he assumed the duties of a deputy sheriff. In order to remain in a law enforcement position at the sheriff's department, Mr. Burns had to attend training at the Tennessee Law Enforcement Academy within one year of being hired. Sometime in the spring of 1992, Mr. Burns learned that Tom Rinehart would be hired as a new sheriff's deputy. Sheriff Nutt assured Mr. Burns that he would still be going to the Law Enforcement Academy in August or September and told him to "get his papers together." This meant, in part, that Mr. Burns

should go for a psychological examination, which he did in June. **Id.** at 1256-1257.

During 1992 and 1993, the number of sheriff's department employees frequently changed. Excluding the sheriff but including his chief deputy, there were fifteen or more employees on the payroll for twenty weeks in each of the years 1992 and 1993. Excluding the sheriff and the chief deputy, there were fewer than fifteen employees for twenty weeks in either 1992 or 1993. **Id.** at 1257.

The sheriff's department employees had differing opinions about Miss Wilson's demeanor at work. The cook, a fifty-seven-year-old woman, thought Miss Wilson dressed inappropriately. She recalled Miss Wilson wearing shorts that revealed her buttocks. Other sheriff's department employees do not remember Miss Wilson dressing inappropriately. The supervising dispatcher only recalls that Miss Wilson "wore blue jeans a lot." The cook once complained to her superiors that Miss Wilson and a young male dispatcher had engaged in "horseplay." An informal investigation was conducted, but there was no confirmation of any misconduct. Miss Wilson and the other young dispatcher did occasionally engage in innocent hijinks but they never kissed or touched each other in a sexual manner. On one occasion, Miss Wilson stopped by headquarters on the way back from a canoe trip wearing a one-piece bating suit and shorts. Sheriff Nutt was not present, but several employees saw her in this attire and observed that her breasts were visible through the bathing suit. At some point during the summer, Miss Wilson and Mr. Burns became intimate. They had sexual relations in late May or early July. **Id.**

On July 4, Miss Wilson had an automobile accident that caused substantial damage to her car. She determined that she would be unable to afford to repair the car if she went away to college. Therefore, she asked Sheriff Nutt if she could stay on as a dispatcher after July 31. The sheriff responded that she

could not remain as a full-time dispatcher because her replacement had already been hired. However, he added there was a strong possibility that she could continue to work part-time and that he would "think about it." **Id.**

On July 13, at approximately 1:30 in the morning, Sheriff Nutt arrived at headquarters. He went into the dispatch room, where Miss Wilson was on duty, and the two engaged in conversation. The sheriff told Miss Wilson about a video he had rented, and they talked briefly about the sheriff's son, who was a friend of Miss Wilson. They also talked about Miss Wilson's plans for college and how they had been affected by her automobile accident. Miss Wilson again indicated that she hoped the sheriff would let her continue working in the fall. After Miss Wilson mentioned that she was nearly out of complaint-cards, the sheriff got up and went to his office. He returned shortly and asked Miss Wilson to join him in the office. **Id.**

Miss Wilson followed Sheriff Nutt into his office believing that he was going to show her where he kept the complaint-cards. The sheriff locked the door behind them and turned out the lights. Miss Wilson was very surprised by the sheriff's action, and she froze in fear. The sheriff then kissed her and put his hand on her breast. Miss Wilson said nothing and did not resist. The sheriff then put his hand on Miss Wilson's crotch, and he took her hand and placed it on his own crotch. Still Miss Wilson did not resist or tell the sheriff to stop, but she did withdraw her hand once he was no longer holding it against him. Sheriff Nutt then unzipped Miss Wilson's jump suit and told her to get on the floor. Miss Wilson just stood there, until the sheriff pulled her down to the floor. The sheriff penetrated Miss Wilson on the office floor. Afterwards, he told her not to tell anyone what had just taken place. **Id.**

Sheriff Nutt never threatened Miss Wilson, nor did he explicitly offer her any reward, such as continued employment,

in exchange for sexual favors. The sheriff's son was asleep in the living quarters, just a few yards for the office, during the entire time Miss Wilson and the sheriff were inside. Had Miss Wilson called out the son would have heard. **Id.** at 1258.

Miss Wilson believed she was being raped. However, she did not resist because she thought it would be futile. She had tried to resist when she was raped at age eleven but to no avail. Therefore, she thought it would be useless to resist against the sheriff. **Id.**

After the incident in the sheriff's office Miss Wilson returned to the dispatch room. Sheriff Nutt went to his bed and fell asleep. **Id.**

At approximately 2:00 a.m., Miss Wilson called Mr. Burns at his home and told him that the sheriff had just raped her. From his home, Mr. Burns called his supervisor, Sergeant Charles Crosslin, to report what he had been told. Mr. Burns then drove to the sheriff's department headquarters. He talked with Miss Wilson and asked whether she wanted to file charges against Sheriff Nutt. Miss Wilson replied that she wanted to file charges, and Mr. Burns telephoned an assistant district attorney to report her allegations. He then telephoned another sheriff's department employee to procure a rape-detection-kit. Mr. Burns also called another dispatcher to fill in for Miss Wilson. He then drove her to the hospital. Witnesses who saw Miss Wilson in the early morning of July 13 observed that she was crying; her hair was disheveled; and she appeared distraught. **Id.**

Wendy Wilson never returned to work at the sheriff's department after the events of July 13. She was paid her ordinary wages through July 14. If Miss Wilson had been paid through July 31, the day she originally planned to leave work at the sheriff's department, she would have earned an additional $396.42. **Id.**

Mr. Burns was beginning a period of family leave on July 13 because his mother had just been diagnosed with

cancer. Sometime between July 13 and July 22, Mr. Burns appeared under subpoena before the Wayne County Grand Jury, which was investigating Miss Wilson's allegations of rape. On July 22, the day Mr. Burns returned to work, he was discharged. His separation notice described the reason for his discharge as "budget restrictions." Mr. Burns was not given a choice of staying on as a dispatcher. As of July 22, there were five dispatchers on the payroll with less seniority than Mr. Burns. No other sheriff's department employees were laid off in the summer of 1992 for lack of funds. **Id.**

Since being discharged from the Wayne County Sheriff's Department, Mr. Burns has applied for work with other law enforcement agencies, but has not obtained a position. He continues to work at the Murray Ohio Manufacturing Company. Had Mr. Burns continued working at the sheriff's department through March 15, 1994, the final day of trial, he would have earned an additional $19,250.00 in wages. If he continued to work through August 31, 1994, the last day of the sheriff's current term, he would have earned another $5,500.00 in wages. **Id.**

In essence, Wendy Wilson and Stevie Burns brought claims against Wayne County, the Wayne County Sheriff's Department, and Sheriff Nutt, alleging that Sheriff Nutt had engaged in sexual harassment and retaliatory discharge in violation of Title VII. They later settled all claims against Wayne County and the Wayne County Sheriff's Department, and those parties were dismissed from the lawsuit. **Wilson v. Nutt**, No. 1-92-0148, slip op. at 1-2 (M.D. Tenn. Nov. 8, 1996).

After this settlement, Sheriff Nutt moved for dismissal. He argued that the Wilson and Burns had been compensated by their employer, Wayne County and the Wayne County Sheriff's Department, and thus they could not seek additional compensation from the employer's agent, Sheriff Nutt. The district court denied the motion, finding the principles of

agency allowed recovery from both the principal and the agent when tortious conduct was involved. **Id.** at 2.

Subsequent to a bench trial, the district court found that Sheriff Nutt had subjected Ms. Wilson to both hostile environment and quid pro quo sexual harassment and had fired Mr. Burns in retaliation for opposing this harassment. **Id.** at 2-3.

However, the district court then dismissed the action, stating:

> This Court cannot ignore what is obvious. The greatest weight of recent legal authority...does not recognize individual liability for Title VII violations. Without a clear statement to the contrary from the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court, this Court concludes that Title VII does not permit suits against individual defendants in their "individual capacities."
>
> **Id.** at 3.

On appeal, the Sixth Circuit referred to the district court's ruling against individual liability, but then stated "[t]he Sixth Circuit has not directly addressed this issue, and we need not do so in this case." Instead, the Sixth Circuit found that Sheriff Nutt could be sued as an "employer" in his official capacity as the Sheriff of Wayne County and remanded the case for further proceedings. **Id.**

Sheriff Nutt moved the district court to dismiss the claims against him which the district court eventually did, reasoning that (1) Sheriff Nutt could not be individually liable as an agent and (2) Miss Wilson's and Mr. Burns' earlier release of Wayne County and Wayne County Sheriff's Department actually released Sheriff Nutt **Id. at 3-7.**

The Sixth Circuit affirmed that decision. **Wilson v. Nutt,** No. 96-6683 (6th Cir. Jan. 22, 1998) (per curiam).

The jurisdiction of the district court was originally invoked pursuant to 28 U.S.C. § 1331 and § 1343(4), this being a suit (1) authorized and instituted pursuant to the Civil Rights Acts of 1964 and (2) to secure the protection of, and to redress the deprivation of rights secured by, 42 U.S.C. § 2000(3)-5(f), et seq., and providing for relief against discrimination and harassment in employment on the basis of sex.

ARGUMENT

Petitioners submit this Court should grant a writ of certiorari because the various federal courts of appeal have not been able to agree--and this Court has yet to decide--whether liability exists for individual sexual harassers under Title VII. Petitioners insist that this issue is an important question of federal law which must be settled by this Court.

The starting point in any statutory construction case, of course, is the language of the statute. **See Landreth Timber Co. v. Landreth,** 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed. 2d 692 (1985). Title VII defines "employer" in relevant part as

> a person engaged in an industry affecting commerce who has fifteen or more employees...**and any agent of such a person.**
>
> 42 U.S.C. § 2000e(b)
> (emphasis added)

The meaning of "agent" as used in this section has engendered the significant split among federal courts. Some courts have held that the literal language means supervisory personnel and other agents of the employer are statutory "employers" who may be held individually liable for discriminatory acts under Title VII. **Paroline v. Unisys Corp.,** 879 F. 2d 100, at 104 (4th Cir. 1989), **rev'd in part, aff'd in relevant part,** 900 F.2d 27 (4th Cir. 1990) (en banc).

By contrast, other circuits have recently reversed course and now interpret this section not as creating individual liability

but as an overly simplistic expression of respondeat superior liability: discriminatory personnel actions taken by an employer's agent only create liability for the employer-entity. **Tomka v. Seiler Corp.**, 66 F.3d 1295 (2d Cir. 1995).

Some circuits simply have not made up their minds. **Scarfo v. Cabletron Systems, Inc.**, 54 F.3d 931, at 952 (1st Cir. 1995) ("contours of...individual liability under Title VII...are currently in a state of evolving definition and uncertainty").

The actual roll call for the circuits with their current positions on individual liability is as follows:

FIRST CIRCUIT: No decision. **Scarfo, supra.**

SECOND CIRCUIT: No individual liability. **Tomka, supra** (split opinion with strong dissent favoring individual liability)

THIRD CIRCUIT: No individual liability. **Sheridan v. E. I. DuPont de Nemours and Co.,** 100 F. 3d 1061 (3d Cir. 1996) (en banc).

FOURTH CIRCUIT: Individual liability for supervisory employees. **Paroline, supra; see also Birkbeck v. Marvel Lighting Corp.**, 30 F.3d 507, at 510 n.1 (4th Cir. 1994) **cert. denied** ___ U.S. ___, 115 S.Ct. 666 (1994) (re-affirming liability for some supervisory actions).

FIFTH CIRCUIT: No individual liability. **Grant v. Lone Star Co.,** 21 F.3d 649 (Fifth Cir. 1994) **cert. denied,** ____ U.S. ____, 115 S. Ct. 574, 130 L.Ed.2d 491 (1994); **but see Hamilton v. Rogers**, 791 F.2d 439, at 442-443 (5th Cir. 1986).

SIXTH CIRCUIT: No individual liability. **Wathen v. General Elec. Co.,** 115 F.3d 400 (6th Cir. 1997); **but cf. Jones v. Continental Corp.,** 789 F.2d 1225, at 1231 (6th Cir. 1986) ("the law is clear that individuals may be held liable...as agents of an employer under Title VII").

SEVENTH CIRCUIT: No individual liability. **Geier**

v. Medtronic, Inc. 99 F.3d 239 (7th Cir. 1996); **but see E.E.O.C. v. Vucitech**, 842 F.2d 936 (7th Cir. 1988) (Title VII judgments affirmed against individual officers/ shareholders who instituted discriminatory policy).

EIGHT CIRCUIT: No decision. **Lenhardt v. Basic Inst. of Tech.,** 55 F.3d 377, at 380 (8th Cir. 1995) (no liability for mere co-workers, but no decision as to individual liability of supervisors).

NINTH CIRCUIT: No individual liability. **Miller v. Maxwell's Intern. Inc.,** 991 F.2d 583 (9th Cir. 1993), **cert. denied**, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed. 2d 372 (1994) (split decision as to individual liability issue).

TENTH CIRCUIT: No individual liability. **Haynes v. Williams,** 88 F.3d 898 (10th Cir. 1996); **but see Ball v. Renner,** 54 F.3d 664, at 667 (10th Cir. 1995) (denying individual liability "makes little sense in analytical terms").

ELEVENTH CIRCUIT: No individual liability. **Cross v. State of Alabama,** 49 F.3d 1490 (11th Cir. 1995); **but cf. Steele v. Offshore Shipbuilding, Inc.** 867 F.2d 1311, at 1316 n. 1 (11th Cir. 1989) (defendant, "an agent of the corporate employer, is directly liable for his actions that violate Title VII").

DISTRICT OF COLUMBIA CIRCUIT: No individual liability. **Gary v. Long**, 59 F.3d 1391 (D.C. Cir. 1995), **cert. denied** (1995).

All courts which have considered this matter agree that, by adding the agent clause to the statutory definition of "employer," Congress sought to make discriminatory acts by both employers (in the traditional sense of the term) and their agents, actionable under Title VII. The question is whether Congress intended that agent clause to permit only *respondeat superior* liability upon the employer for the acts of his or her gents, or rather, to also permit holding employers and their agents jointly and severally liable for the discriminatory acts of the agent.

To aid in this inquiry, the Supreme court has pointed out that "Congress wanted courts to look to agency principles for guidance. See **Meritor Savings Bank, F.S. B. v. Vinson**, 477 U.S. 57, 72, 106 S.Ct. 2399, 2409, 91 L.Ed.2d 49 (1986) (citing, generally, Restatement (Second) of Agency §§219-237 (1958)). **Meritor** itself outlines the contours of Title VII liability for sexual harassment consistent with traditional agency principles. While the issue of individual liability for an employer's agent was not before the Court in **Meritor**, its focus upon traditional agency principles suggest that joint and several liability between an agent and his employer, thus individual liability of the agent, is logically consistent wit the Court's broader discussion of sexual harassment actionable under Title VII.

This Court's reliance upon traditional agency principles, and the Restatement in particular, is instructive. Indeed, the Restatement itself prescribes joint and several liability, as opposed to mere respondeat superior liability, for tortious conduct committed against a third party by either an agent alone, or an agent together with that agent's principal. Restatement (Second) of Agency § 217B(1) (1958). If, as **Meritor** suggests, Congress intended to incorporate traditional agency principles in determining whether an agent's acts implicate Title VII liability, there is no inconsistency in reading the agent clause as evidence that Congress further intended to incorporate these same traditional agency principles with regard to the scope of liability. Accordingly, Title VII permits employers and their agents to be held jointly and severally liable for "the tortious conduct of an agent or that of agent and principal." **Id.**

As may be gathered by the foregoing, a literal reading of the agent clause in Title VII suggests Congress not only intended to make discriminatory acts by both employers and their agents actionable under Title VII, but also, that Congress intended to make those who discriminate, both employers and

agents acting under the cloak of authority of their employers, answerable, jointly and severally, for those discriminatory acts. The statute means exactly what it says: both employers of 15 or more persons and their agents may be held liable for Title VII violations.

The Sixth Circuit's position in **Wathen, supra** is fairly representative of the reasoning of those circuits denying individual liability. Interestingly, **Wathen** relies heavily upon the Ninth Circuit's **Miller, supra** and the Second Circuits **Tomka, supra,** two decisions with strongly worded dissents in favor of individual liability. **Wathen, supra**, 115 F.3d at 403-406. The arguments of **Wathen, Miller**, and **Tomka** for ignoring the clear language of 42 U.S.C. § 2000e(b) essentially center on the intent of Congress as divined from (1) the requirement by Congress that an employer have fifteen or more employees and (2) the nature of the relief available both before and after Congress enacted the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The conclusion ultimately drawn is that "the obvious purpose of this agent provision was to incorporate respondeat superior liability into the statue." **Wathen, supra**, 115 F.3d at 405-406 (citing **Miller, supra**, 991 F.2d at 587).

The **Miller/Wathen/Tomka** reliance upon the fact that the statutory definition of "employer" is limited to those who employ fifteen or more employees is flawed for two reasons. First, the floor debates concerning Title VII suggest that the minimum employee threshold was not created to protect small "entities" from potential liability, but rather, that it was deemed necessary to justify federal legislation in the employment context under the Commerce Clause. **See, e.g.**, 110 Cong. Rec. 6566 (1964) (letter from minority membership of House Committee on the Judiciary); 110 Cong.Rec. 6548 (1964); 110 Cong. Rec. 7052, 7054 (1964) (remarks of Sen. Humphrey); 110 Cong. Rec. 7088 (1964) (remarks of Sen. Stennis); 110 Cong. Rec.S. 7207-12 (1964) (remarks of Sen. Clark).

Moreover, where Title VII's impact upon small

businesses was debated, those debates voiced a concern that federal legislation not intrude upon the intimate--often family--ties which often exist in businesses employing only a handful of people. 110 Cong. Rec. 13,086 (1964). **See generally** Janice R. Franke, **Does Title VII Contemplate Personal Liability for Employee/Agent Defendants**?, 12 Hofstra Lab.L.J. 39 (1994).

Second, the continued references to Congress' concern for small "entities" is misleading. Where Congress addressed the impact of potential liability, it concerned itself soley with the impact upon small **business,** as opposed to "entities." 110 Cong. Rec. 13,085-93 (1964) (debate on proposed Cotton Amendment). During those debates, its primary concern was the overall impact upon the economy should a large number of small businesses be forced to litigate discrimination claims. **See e.g.**, 137 Cong.Rec. 18,336, 18,337-8 (1991) (remarks of Sen. Hatch); 137 Cong. Rec. 3857, 3874 (1991) (remarks of Rep. Moody). The debate concerning the economic viability of small businesses simply did not concern itself with the potential civil liability of an employee who discriminates against a co-worker or subordinate.

The proposition that Congress was concerned with the impact of civil liability upon small "entities" is further undermined by the fact that employers and agents of those employers face unlimited civil liability for similar discriminatory acts under 42 U.S.C. § 1981, regardless of the number of persons they employ. **See e.g. Mitchell v. Keith**, 752 F.2d 385, 388 (9th Cir. 1985), **cert. denied**, 472 U.S. 1028, 105 S.Ct. 3502, 87 L.Ed.2d 633 (1985); **Mahone v. Waddle**, 564 F.2d 1018, 1029 (3d Cir. 1977), **cert. denied**, 438 U.S. 904, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978); **Faraca v. Clements**, 506 F.2d 956, 960 (5th Cir. 1975), **cert. denied**, 422 U.S. 1006, 95 S.Ct. 2627, 45 L.Ed.2d 669 (1975). The liability scheme under § 1981 is of particular relevance to Title VII because proponents of the 1991 amendments to Title VII made

"parity" between the damages available under § 1981 and those available under Title VII a stated goal of those amendments. H.R. Rep. No. 102-40(II), 102d Cong. 1st Sess. 24-30 (1991), reprint in 1991 U.S.C.C.A.N. 694, 717-23 (1992).

The other basis for the anti-individual liability holdings concerns the relief available both before and after the 1991 amendments to Title VII.

> [In permitting compensatory and punitive damages], Congress specifically limited the damages available depending upon the size of the respondent **employer**...[W]e think that if Congress had envisioned individual liability under Title VII for compensatory or punitive damages, it would have included **individuals** in this litany of limitations and would have discontinued the exemption for small employers...
>
> **Miller**, 991 F.2d at 587-88, n. 2; **Weathen**, 115 F.3d 406.

As discussed above, Congress may have had other reasons for hesitating to repeal the exemption for small employers. As for the liability caps created under the 1991 amendments, staggered according to the size of the employer, one can only speculate as to their purpose: there is no mention of the liability caps in the official legislative history to the amendments. **See** H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 142-3 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 671-2 (1992). H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 68-70 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 754-56 (1992).

The **Miller/Wathen/Tomka** reasoning regarding liability caps ultimately rests upon the assumption that Congress could not have intended tort liability to lie against employer's agents because such liability would be too burdensome for individuals to bear. However, it is worth recalling that Title VII liability on the part of employer's agent

must be premised upon a prior finding that the complained-of conduct may properly be imputed to the employer as well. **Meritor**, 477 U.S. at 70-71, 106 S.Ct. at 2407. Consequently, under a literal reading of the statute, wherever Title VII liability is established, a remedy is available against the employer by *respondeat superior,* as well as against the employer and his agent together, jointly and severally. Therefore, the implication that an employer's agent would be forced to bear the full brunt of Title VII liability, without the agent's employer also bearing a portion of that liability, is illusory. Of course, an inequity which may have been created by the staggered liability caps is of Congress' making and the remedy for it lies solely with the body.

As noted above, Congress imposed tort damages for Title VII violations, in part, to establish "parity" between the liability schemes under Title VII and 42 U.S.C. § 1981. **See also** H.R. Rep. No. 92-238, 92d Cong., 2d Sess. 19 (1971); S.Rep. No. 92-415, 92d Cong., 2d Sess. 24 (1971). The possibility that an employer's agent might be held liable for tort damages under § 1981 has existed since at least 1975. **See Faraca**, 506 F.2d 956. If individual liability for discriminatory acts was truly beyond the contemplation of Congress, it had ample opportunity to correct those courts which have permitted such liability. Instead, the 1991 amendments broadened the damages available under Title VII and reaffirmed the breadth of liability under § 1981. The apparent political necessity of liability caps within that scheme should not shroud the clear desire on the part of Congress to bolster the broad remedial goals of Title VII.

Miller, Wathen and **Tomka** also rely upon the proposition that back pay and reinstatement are equitable remedies which are most appropriately provided by employers, defined in the traditional sense of the word.

There is no plausible reason why an individual harasser in a supervisory position could **not** be ordered to pay back pay,

and as for the availability of reinstatement relief against an employer's agent, there are circumstances where a supervisor will have the authority to rehire, promote, and correct employment records.

Thus it makes no sense to foreclose individual liability in all cases arising under Title VII, contending, categorically, that back pay and reinstatement "can only be provided by employers," while admitting that there may be instances where individual defendants may have the authority to provide precisely the remedy sought by the plaintiff.

As 42 U.S.C § 2000e-5(g)(1) places the scope of equitable relief within the discretion of the district courts, these courts should also consider the propriety of imposing a reinstatement order against an employer's agent, in addition to or independent of that agent's employer, where the plaintiff has chosen to seek such relief based on the specific facts of the particular case. Why foreclose remedies provided for under the statute based solely upon assessments of the likelihood that a given defendant will have reinstatement authority or that the fact-finding necessary to determine the scope of that authority may be too burdensome?

CONCLUSION

Title VII permits an employer and that employer's agent to be held jointly and severally liable for Title VII violations. The language of the statute permits it, canons of statutory interpretation require it, and the object and overriding policy goals of Title VII warrant it.

COLLEY & COLLEY

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Counsel for Petitioners

APPENDIX (OPINIONS BELOW)

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NOT RECOMMENDED FOR PUBLICATION

No. 96-6683

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WENDY LEE WILSON; and STEVIE BURNS,	)	
Plaintiffs-Appellants,	)	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
v.	)	
LEON "BUDDY" NUTT,	)	**MEMORANDUM OPINION**
Defendant-Appellee.	)	

BEFORE: WELLFORD, NORRIS and SILER, Circuit Judges.

PER CURIAM. We now address for the second time the issue of Sheriff Leon "Buddy" Nutt's potential Title VII liability to plaintiffs, Wendy Lee Wilson and Stevie Burns. In the previous appeal, No. 94-5740, we remanded the case after the district court had dismissed plaintiff's Title VII suit against Nutt in his individual capacity. In significant part, the per curiam opinion reads:

> The [district] court adopted the position of a majority of circuits holding that Title VII does not provide for individual liability. The Sixth Circuit has not directly addressed this issue, and we need not do so in this case. Based upon defendant's concessions and the nature of the office of Sheriff in Tennessee, we hold that Nutt

> may be sued in his official capacity as Sheriff of Wayne County.

Unpublished Opinion in No. 94-5750, at 4.

On remand, plaintiffs' counsel asserted Title VII claims against Nutt in both his individual and official capacities, since our opinion seemed to leave open the possibility that individual liability might lie under Title VII in this circuit. This appeal arises from the district court's subsequent dismissal of plaintiffs' Title VII claim against Nutt in both his individual and official capacities.

The issues raised on appeal are whether defendant can be liable in his individual capacity under Title VII of the Civil Rights Act, and whether plaintiffs' settlement with the Wayne County Sheriff's Department released defendant from liability in his official capacity.

The first issue has been decided recently by this court in a manner adverse to plaintiffs' cause, a point conceded by their counsel in oral argument. *See Wathen v. General Elec. Co.*, 115 F.3d 400 (6th Cir. 1997).

As for the second issue, the district court correctly concluded that plaintiffs' settlement release of "Wayne County, Tennessee and Wayne County Sheriff's Department" amounted to a release from liability of defendant Leon "Buddy" Nutt in his official capacity as sheriff. When a person says he is suing a public official in his "official capacity," that term is being utilized as shorthand for the government agency to which the plaintiff is looking for recovery. *Matthews v. Jones,* 35 F.3d 1046 (6th Cir. 1994) (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 68 (1989)). Here, because plaintiffs had settled with, and released from liability, the only government

agencies that could have been responsible as their employer, the district court did not err in concluding that defendant Nutt, in his official capacity, was protected by the release.

Accordingly, the order of the district court dismissing plaintiffs' lawsuit, with prejudice, is **affirmed**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

WENDY LEE WILSON, et al.,	)	
	)	NO. 1-92-0148
V.	)	REPORTED AT
	)	856 F. Supp. 1254
WAYNE COUNTY, et al.,	)	

MEMORANDUM

This is a Title VII sexual harassment and retaliatory discharge action brought by Wendy Lee Wilson and Stevie Burns. Ms. Wilson alleges that Leon "Buddy" Nutt, the sheriff of Wayne County, Tennessee, sexually harassed her while she was working as a dispatcher for the Wayne County Sheriff's Department. Mr. Burns alleges that Sheriff Nutt fired him from his job as a deputy sheriff in retaliation for opposing the harassment of Ms. Wilson.

The plaintiffs originally sued Wayne County, the Wayne County Sheriff's Department, and Sheriff Nutt. They subsequently settled their claims against Wayne County and the Wayne County Sheriff's Department.[1] Thus, when this case came to be tried, only Sheriff Nutt remained as a defendant.

Now, having heard all the evidence, the Court finds that Sheriff Nutt did sexually harass Ms. Wilson and that he did terminate Mr. Burns in retaliation for opposing this harassment. Nevertheless, the Court concludes that Title VII does not permit suits against individual defendants in their individual

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[1] Prior to the settlement, there was some uncertainty as to whether the Wayne County Sheriff's Department was an entity subject to suit. However, the settlement has obviated the need to address this question.

capacities. Accordingly, the Court shall dismiss this action with prejudice.

I. Findings of Fact.[2]

Wendy Lee Wilson is twenty years old. At age eleven, she was abducted in Wayne County, Tennessee, and raped. Her attacker was arrested, and he is still in prison. In the spring of 1992, Ms. Wilson began working as a dispatcher at the Wayne County Sheriff's Department. She was still a senior in high school and planned to go away to college in the fall. The sheriff's department hired her with the understanding that she would leave her position on July 31 to attend college.

Leon "Buddy" Nutt is fifty-five years old. He was elected Sheriff of Wayne County in 1990. When Ms. Wilson began working at the sheriff's department, Sheriff Nutt knew that she had been raped. He remembered the incident from the time it happened. He also discussed it with another sheriff's department employee, to whom he expressed his belief that Ms. Wilson was emotionally disturbed as a result of the rape.

Stevie Burns is thirty-three years old. He has worked for the Murray Ohio Manufacturing Company for fifteen years. In October, 1990, he began working part-time as a volunteer "auxiliary officer" for the Wayne County Sheriff's Department. In October, 1991, he was added to the sheriff's department payroll. See defendant's exhibit D-1 (sheriff's department

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[2] Although the Court concludes that this action must be dismissed, the Court nevertheless makes findings of fact in case the action should be reinstated on appeal. It is better to make findings of fact now, while the subtleties of the live testimony are still fresh in mind, rather than try to recall the events of trial many months later. This is especially true in this case, where important live testimony was in conflict, and the court must assess the credibility of witnesses, in part, on the basis of their demeanor on the stand.

payroll records). Mr. Burns started off as a dispatcher and warrant server. However, over time he assumed the duties of a deputy sheriff.[3] In order to remain in a law enforcement position at the sheriff's department, Mr. Burns had to attend training at the Tennessee Law Enforcement Academy within one year of being hired. Sometime in the spring of 1992, Mr. Burns learned that Tom Rinehart would be hired as a new sheriff's deputy. Sheriff Nutt assured Mr. Burns that he would still be going to the Law Enforcement Academy in August or September and told him to "get his papers together." This meant, in part, that Mr. Burns should go for a psychological examination, which he did in June.

During 1992 and 1993, the number of Sheriff's department employees frequently changed. Excluding the sheriff but including his chief deputy, there were fifteen or more employees on the payroll for twenty weeks in each of 1992 and 1993.[4] Excluding the sheriff and the chief deputy, there were fewer than fifteen employees for twenty weeks in either 1992 or 1993. See defendant's exhibit D-1.

The sheriff's department employees had differing

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[3] The payroll records list Mr. Burns as a "part-time deputy," with the exception of the November, 1991 records, which list him as a "dispatcher/deputy." Mr. Burns's annual salary of $12,000 was higher than that of other dispatchers but lower than that of other deputies. See defendant's exhibit D-1.

[4] No evidence was presented at trial regarding the duties of the chief deputy. Sheriff Nutt has argued that the chief deputy should not be counted as an employee because he serves on the sheriff's "personal staff." See 42 U.S.C. 2000e(f) (person chosen by an elected official to serve on the official's "personal staff" is excluded from Title VII's definition of "employee"); see also memorandum (entered September 16, 1993, Docket entry No. 47 at 4-6.

opinions about Ms. Wilson's demeanor at work. The cook, a fifty-seven-year-old woman, thought Ms. Wilson dressed inappropriately. She recalls Ms. Wilson wearing shorts that revealed her buttocks. Other sheriff's department employees do not remember Ms. Wilson dressing inappropriately. The supervising dispatcher only recalls that Ms. Wilson "wore blue jeans a lot." The cook once complained to her superiors that Ms. Wilson and a young male dispatcher had engaged in "horseplay." An informal investigation was conducted, but there was no confirmation of any misconduct. Ms. Wilson and the other young dispatcher did occasionally engage in innocent hijinks, but they never kissed or touched each other in a sexual manner. On one occasion, Ms. Wilson stopped by headquarters on the way back from a canoe trip wearing a one-piece bathing suit and shorts. Sheriff Nutt was not present, but several employees saw her in this attire and observed that her breasts were visible through the bathing suit. At some point during the summer, Ms. Wilson and Mr. Burns became intimate. They had sexual relations in late May or early July.

On July 4, Ms. Wilson had an automobile accident that caused substantial damage to her car. She determined that she would be unable to afford to repair the car if she went away to college. Therefore, she asked Sheriff Nutt if she could stay on as a dispatcher after July 31. The sheriff responded that she could not remain as a full-time dispatcher because her replacement had already been hired. However, he added there was a strong possibility that she could continue to work part-time and that he would "think about it."

On July 13, at approximately 1:30 in the morning Sheriff Nutt arrived at headquarters. He went into the dispatch room, where Ms. Wilson was on duty, and the two engaged in conversation. The sheriff told Ms. Wilson about a video he had rented, and they talked briefly about the sheriff's son, who was a friend of Ms. Wilson. They also talked about Ms. Wilson's plans for college and how they had been affected by her automobile accident. Ms. Wilson again indicated that she hoped the sheriff would let her continue working in the fall.

After Ms. Wilson mentioned that she was nearly out of complaint-cards, the sheriff got up and went to his office. He returned shortly and asked Ms. Wilson to join him in his office.

Ms. Wilson followed Sheriff Nutt into his office believing that he was going to show her where he kept the complaint-cards. The sheriff locked the door behind them and turned out the lights. Ms. Wilson was very surprised by the sheriff's actions, and she froze in fear. The sheriff then kissed her and put his hand on her breast. Ms. Wilson said nothing and did not resist. The sheriff then put his hand on Ms. Wilson's crotch, and he took her hand and placed it on this own crotch. Still, Ms. Wilson did not resist or tell the sheriff to stop, but she did withdraw her hand once he was no longer holding it against him. Sheriff Nutt then unzipped Ms. Wilson's jump-suit and told her to get on the floor. Ms. Wilson just stood there, until the sheriff pulled her down to the floor. The sheriff penetrated Ms. Wilson on the office floor. Afterwards, he told her not to tell anyone what had just taken place.

Sheriff Nutt never threatened Ms. Wilson, nor did he explicitly offer her any reward, such as continued employment, in exchange for sexual favors. The sheriff's son was asleep in the living quarters, just a few yards from the office, during the entire time Ms. Wilson and the sheriff were inside. Had Ms. Wilson called out, the son would have heard.

Ms. Wilson believed she was being raped. However, she did not resist because she thought it would be futile. She had tried to resist when she was raped at age eleven but to no avail. Therefore, she thought it would be useless to resist against the Sheriff.[5]

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[5] Ms. Wilson testified at trial, "When you go through something like that once and it doesn't work...when you fight and it does not work...you don't feel like fighting again." She explained further that she did not resist because the sheriff

After the incident in the sheriff's office Ms. Wilson returned to the dispatch room. Sheriff Nutt went to his bed and fell asleep.

At approximately 2:00 a.m., Ms. Wilson called Stevie Burns at his home and told him that the sheriff had just raped her. From his home, Mr. Burns called his supervisor, Sergeant Charles Crosslin, to report what he had been told. Mr. Burns then drove to the sheriff's department headquarters. He talked with Ms. Wilson and asked whether she wanted to file charges against Sheriff Nutt. Ms. Wilson replied that she wanted to file charges, and Mr. Burns telephoned an assistant district attorney to report her allegations. He then telephoned another sheriff's department employee to procure a rape-detection-kit. Mr. Burns also called another dispatcher to fill in for Ms. Wilson. He then drove her to the hospital. Witnesses who saw Ms. Wilson in the early morning of July 13 observed that she was crying; her hair was disheveled; and she appeared distraught.

Wendy Wilson never returned to work at the sheriff's department after the events of July 13. She was paid her ordinary wages through July 14. See plaintiff's exhibit P-1 (final paycheck stub). If Ms. Wilson had been paid through July 31, the day she originally planned to leave work at the sheriff's department, she would have earned an additional $396.42.

Stevie Burns was beginning a period of family leave on July 13 because his mother had just been diagnosed with cancer. Sometime between July 1[illegible]nd July 22, Mr. Burns appeared under subpoena before the Wayne County Grand Jury, which was investigating Ms. Wilson's allegations of rape.[6] On July 22, the day Mr. Burns returned to work, he was discharged. His separation notice described the reason for his

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was "in a position of authority."

[6] The grand jury did not indict Sheriff Nutt.

discharge as "budget restrictions." See plaintiff's exhibit P-2 (separation notice). Mr. Burns was not given a choice of staying on as a dispatcher. As of July 22, there were five dispatchers on the payroll with less seniority than Mr. Burns.[7] No other sheriff's department employees were laid off in the summer of 1992 for lack of funds.

Since being discharged from the Wayne County Sheriff's Department, Mr. Burns has applied for work with other law enforcement agencies, but has not obtained a position. He continues to work at the Murray Ohio Manufacturing Company. Had Mr. Burns continued working at the sheriff's department through March 15, 1994, the final day of trial, he would have earned an additional $19,250 in wages. If he continued to work through August 31, 1994, the last day of the sheriff's current term, he would have earned another $5,500 in wages.

Tom Rinehart first applied for a position in the Wayne County Sheriff's Department in August, 1990. See defendant's exhibit No. 5. He previously had worked as a policeman in Alabama. Because Mr. Rinehart had two years' law enforcement experience, the Wayne County Sheriff's Department would be eligible for a $5,000 grant towards his salary if Mr. Rinehart were to become a certified Tennessee law enforcement officer. The grant wold be provided by the "D.A.R.E." (Drug Abuse Resistance and Education) program.

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[7] William Kropf was first hired in November 1991; he was dropped from the payroll in May, 1992, and re-hired in early July, 1992. Chad Balentine and Julie Norris both were hired in March 1992. Marty Bolitho was hired in May, 1992. Kenny Nutt was hired in July, 1992. Also Jeff Gray was hired as a dispatcher in February, 1992; his title was changed to "TAC dispatcher" in June, 1992. See defendant's exhibit D-1. The evidence does not explain the difference between a "TAC dispatcher" and an ordinary "dispatcher."

Mr. Rinehart passed his certification exam on July 31, 1992. See id. In mid-August, Mr. Rinehart was added to the sheriff's department payroll as a deputy sheriff. His annual salary is $13,000. In accordance with the D.A.R.E. program, much of Mr. Rinehart's work is devoted to lecturing schoolchildren about drugs.

II. Conclusions of Law.

A. Sexual Harassment under Title VII.

Title VII of the Civil Rights Act of 1964 provides that "it shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to [her] compensation, terms, conditions or privileges of employment because of such individual's...sex...." 42 U.S.C. § 2000e-2(a)(1). When a supervisor sexually harasses a subordinate because of her sex, the supervisor violates Title VII. Meritor Savings Band v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49,58 (1986).

Courts recognize two kinds of sexual harassment prohibited by Title VII; 1) the "hostile work environment" and 2) the "quid pro quo." Kauffman v. Allied Signal, Inc., 970 F.2d 182 (6th Cir.), cert denied, ___ U.S. ____, 113 S.Ct. 831, 121 L.Ed. 2d 701 (1992). The first is found where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." Harris v. Forklift Sys., Inc., 510 U.S. ___, 114 S.Ct. 367, 370, 126 L. Ed. 2d 295, 301 (1993). The second arises when "submission to...unwelcome sexual advances of supervisory personnel was an express or implied condition for receiving job benefits or...a tangible job detriment result from the employer's failure to submit to the sexual demands of supervisory employees." Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986). "[T]he trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of

the circumstances, which as the nature of the sexual advances and the context in which the alleged incidents occurred.'" Vinson, 477 U.S. at 69, 106 S.Ct. at 2406, 91 L.Ed.2d at 61 (quoting 29 C.F.R. § 1604.11(b) (1985).

In the instant action, the Court concludes that Sheriff Nutt subjected Wendy Wilson to both hostile environment and quid pro quo sexual harassment.

1) Hostile Environment.

By luring Ms. Wilson into his office in the dead of night, locking off her only route of escape, fondling her, placing her hand on his crotch, and physically pulling her to the floor to have sexual relations, Sheriff Nutt created an extremely hostile work environment. Indeed, his actions on the morning of July 13 were so intimidating and abusive to Ms. Wilson as to constitute a constructive discharge from employment. See Yates v. Avco Corp., 819 F. 2d 630, 636-38 (6th Cir. 1987) ("A constructive discharge exists if 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have been compelled to resign.'").

Sheriff Nutt contends that the evidence does not support finding a hostile environment because Ms. Wilson never indicated to him that his sexual advances were unwelcome. He further argues that he reasonably believed his advances would be well-received on the basis of Ms. Wilson's demeanor at work. To support these arguments, the sheriff relies on the Supreme Court's opinion in Vinson, wherein the Court stated: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome..." 477 U.S. at 68, 106 S.Ct. at 2406, 91 L.Ed.2d at 60 (emphasis added).

Contrary to the sheriff's contentions, the evidence does support the Court's finding that Ms. Wilson manifested displeasure at his advances. Specifically, Ms. Wilson refused to reciprocate his fondling of her, even after he tried putting her hand on his own crotch, and she refused his direction to get on the floor. At the latest, when the sheriff had to physically pull Ms. Wilson to the floor to achieve his objective, it should have

been apparent to him that his advances were unwelcome. Nor did Ms. Wilson's comportment at work indicate that she would welcome any advances by Sheriff Nutt. The fact that an eighteen-year-old girl wore shorts during the summer months in Tennessee, wore a bathing suit on a canoe trip, and engaged in non-sexual horseplay with a co-worker her own age should not be perceived by even the most optimistic fifty-three-year-old man as a willingness to have sex with him. Likewise, the fact that Ms. Wilson had sex with Mr. Burns did not indicate her desire to have sex with Sheriff Nutt.

2) Quid Pro Quo.

Sheriff Nutt subjected Ms. Wilson to quid pro quo harassment by making submission to his unwelcome sexual advances a condition to continued employment at the sheriff's department. Only a few days before the events of July 13, Ms. Wilson had asked Sheriff Nutt if she could stay on as a dispatcher in the fall, and he responded that he would "think about it." Minutes after she raised the issue again, the sheriff called her into his office for sex. The Court concludes that Sheriff Nutt had made submission to his sexual advances the test for whether Ms. Wilson would stay on as a dispatcher. As such, he subjected her to the classic form of quid pro quo harassment by conditioning a job benefit on submission to unwelcome sexual advances. See Highlander, 805 F. 2d at 648.

Ms. Wilson admits that the sheriff never explicitly offered her continued employment in exchange for sexual favors. In fact, her lawyer disclaims that Ms. Wilson ever understood that the sheriff might be conditioning her continued employment on what would happen on the floor of his office. The Court, however, concludes that these points are irrelevant. According to the United States Court of Appeals for the Sixth Circuit, a plaintiff may prove quid pro quo harassment by showing that submission to unwelcome sexual advances was "an express or implied condition for receiving job benefits." Id. (emphasis added). Ms. Wilson may not have realized what the conditions were for her to stay on as a dispatcher, but this Court is not so naive. The Court concludes that Sheriff Nutt

conditioned Ms. Wilson's continued employment on her submission to his sexual advances, and, in so doing, he violated the law.

B. Retaliatory Discharge under Title VII.

Title VII also makes it unlawful "for any employer to discriminate against any of his employees...because [the employee] has opposed any practice made an unlawful employment practice by the subchapter..." 42 U.S.C. § 2000e-3(g). To make out a prima facie case under this provision a plaintiff must prove three elements: (1) he opposed an unlawful employment practice; (2) he was subsequently subjected by his employer to adverse employment action; and (3) a causal link existed between the first two elements. Yates v. Avco Corp., 819 F.2d 630, 638 (6th Cir. 1987). A close proximity between the opposition and the adverse employment action is evidence of a "causal link." Wrenn v. Gould, 808 F.2d 493, 501 (6th Cir. 1987). If the employer puts forward a legitimate reason for the adverse employment action, the plaintiff must demonstrate that the proffered reason was merely a pretext for retaliation. Id.

The Court concludes that Sheriff Nutt fired Mr. Burns in retaliation for opposing the sheriff's harassment of Ms. Wilson. Among the actions that Deputy Burns took in opposition to the harassment were the following: he notified an assistant district attorney of Ms. Wilson's allegations; he procured a rape-detection-kit; he contacted a sheriff's department sergeant; he took Ms. Wilson to the hospital for an examination; and he testified before the Wayne County Grand Jury. Courts consider a wide variety of activities as constituting "opposition" under the anti-retaliation provision of Title VII. Coleman v. Wayne State Univ., 664 F. Supp. 1082, 1092 (E.D. Mich. 1987). forms of protected opposition include publicly and privately expressing that an employer has illegally discriminated, id., reporting illegal discrimination of supervisors, Jenkins v. Orkin Exterminating Co., 646 F. Supp. 1274 (E.D. Tex. 1986), and testifying in court about illegal discrimination. Truelove v. Trustees of Univ. of D.C., 744 F. Supp. 307, 313 (D.D.C. 1990). Mr. Burns's actions on behalf

of Ms. Wilson fall within the realm of protected opposition.

The Court rejects as pure pretext Sheriff Nutt's explanation that he laid off Mr. Burns because of budget restriction. Not only was Mr. Burns the only employee that the sheriff found to be too costly during the summer of 1992, but the sheriff proceeded to add Tom Rinehart to the payroll within a month after laying off Mr. Burns. Even considering that some of Mr. Rinehart's salary is paid by a third party, the Court is unable to reconcile his hiring so soon after the lay-off of Mr. Burns as anything other than proof that the latter's termination was not based on financial considerations. This conclusion is further buttressed by the fact that Sheriff Nutt previously had assured Mr. Burns that Mr. Rinehart's arrival would not affect his own job and had even told Mr. Burns to "get his papers ready" to go to the Law Enforcement Academy in August or September. Finally, Sheriff Nutt has failed to explain why he singled out Mr. Burns as the solution to the alleged financial difficulties of the sheriff's department. There were numerous junior employees working as dispatchers, but the sheriff never offered Mr. Burns the option of staying on in that capacity, even though Mr. Burns was an experienced dispatcher. The sole conclusion that the Court draws from these facts is that Sheriff Nutt fired Mr. Burns in retaliation for opposing his harassment of Ms. Wilson.

C. Individual Liability under Title VII.

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees...and any agent of such a person...." 42 U.S.C. § 2000e(b) (emphasis added). This definition has caused much difficulty for courts confronting the question of whether individual agents may be personally liable for discriminatory acts they commit on the job.

The greatest weight of recent authority concludes that there is not individual liability under Title VII. E.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); Miller v. Maxwell's Inst'l, Inc., 991 F. 2d 583, 587-88 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1049, 127 L.Ed. 2d 372

(1994); Busby v. City of Orlando, 931 F. 2d 764, 772 (11th Cir. 1991) (per curiam); Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990); Lowry v. Clark, 843 F. Supp. 228, 229-31 (E.D. Ky. 1994); Johnson v. Northern Ind. Pub. Serv. Comm'n, 844 F. Supp. 466, 468-70 (N. D. Ind. 1994); Dirksen v. City of Springfield, 842 F. Supp. 1117, 1122 (C.D. Ill. 1994); Henry v. E.G. & G. Mo. Metals Shaping Co., 837 F. Supp. 312, 314 (E.D. Mo. 1993); Roos v. Smith. 837 F. Supp. 803, 806 (S.D. Miss. 1993); Stafford v. Missouri, 835 F. Supp. 1136, 1149 (W.D. Mo. 1993); Pelech v. Klaff-Joss L.P., 828 F. Supp. 525, 529 (N.D. Ill. 1993) (Aspen, J.); Jenkins v. City of Grenada, 813 F. Supp. 443, 447 (N. D. Miss. 1993). However, some courts continue to hold to the contrary. E. g., Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993); Raiser v. O'Shaughnessy, 830 F. Supp. 1134, 1137 (N. D. Ill. 1993) (Moran, J.); Willis v. Gillis Advertising Co., 61 Emp. Prac. Dec. (CCH) 42, 245 (N.D. Ala. 1993); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1179-80 (S. D. N. Y. 1992); see also Paroline v. Unisys Corp., 879 F. 2d 100, 106 (4th Cir. 1989), vacated in part on other grounds, 900 F. 2d 27 (4th Cir. 1990) (en banc) (supervisor may be liable as an "employer"); Steele v. Offshore Shipping, Inc., 867 F. 2d 1311, 1316 n. 1 (11th Cir. 1989) (supervisor may be "directly liable for his actions that violate Title VII"); Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law, ch. 23 (1992) (individual liability exists where there is substantial personal involvement by agent in discriminatory conduct.)

Those cases cited about which deny the existence of individual liability have distinguished between an agent's liability in his "official capacity" as agent of the employer and his liability in his "individual capacity." In so doing, they borrow from the jurisprudence of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which construes "official capacity" suits as proceeding against the government entity which the individual defendant serves, rather than against the individual defendant personally in his "individual capacity." See Kentucky v. Graham, 473 U.S. 159, 165-68, 105 S. Ct. 3099, 3105-06, 87

L. Ed. 2d 114, 121-23 (1985). These courts assert that the phrase "and any agent" in Title VII's definition of "employer" means agents in their "official capacity" as representatives of employers. They support this construction by pointing out that Title VII, as it was originally enacted, only permitted equitable relief, which is generally appropriate against employers, but not their agents.

Those courts taking the opposite view rely on the plain language of Title VII's definition of "employer," which includes "any agent" of the employer, without reference to "individual" or "official" capacity. They also point out that the Civil Rights Act of 1991 expanded the remedies available under Title VII to include compensatory damages, see 42 U.S.C. § 1981a(1), which may properly be levied against individual defendants. Finally, they cite the broad remedial purpose of Title VII as calling for a liberal construction of "employer."

The Court of Appeals for the Sixth Circuit has not directly addressed this issue, and its opinions provide little guidance. In one case, the Court observed in dictum that a supervisory employee could have been "sued in this official capacity as executive director, i.e., agent, or the [defendant] association provided the association was the employer of [the requisite number of] persons." York v. Tennessee Crushed Stone Ass'n, 684 F. 2d 360, 362 (6th Cir. 1982) (emphasis added). However, the Court concluded that the association did not employ the requisite number of person and never explained what it meant by the phrase "official capacity." [8] In a later

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[8] One of the cases on which the Court of Appeals relied in its observation that individuals may be sued under Title VII in their "official capacities" specifically rejected the official/individual capacity distinction. In that case, the district court stated:

> Whether such [discriminatory acts] took place as a private person or as an officer is of

opinion in which the Court of Appeals **was** deciding whether it had been "unreasonable and vexatious" for purposes of assessing attorney's fees under 28 U.S.C. § 1927 to sue an individual defendant under Title VII, the court said: "[T]he law is clear that individuals may be held liable...as 'agents' of an employer under Title VII. Since the individual employees were at least arguably 'agents' of the employer, we think it obvious that Jones's counsel were intentionally and properly seeking

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> no import here. Title VII actions do not contain "under color of state law" problems associated with Section 1983 actions. If the person against whom the complaint is filed is within the definition of "employer," his capacity during the alleged discriminatory events is irrelevant, so long as the alleged discrimination relates to employment.

Kelly v. Richland School Dist. 2, 463 F. Supp. 216, 218 (D.S.C. 1978) (citation omitted). Even the Kelly court, however, seems somewhat confused about the relevance of the official/individual capacity distinction in Section 1983 litigation. In a Section 1983 action the defendant's "capacity" has nothing to do with the question of whether he was acting under color of sate law when he commited the alleged illegal act. Rather, it concerns the manner in which the plaintiff pleads her lawsuit. If she sues a defendant in ihs individual capacity, she seeks to recover from him personally. If she sues him in his official capacity, she asserts a right to relief against the governmental entity the defendant serves. See Kentucky Graham, 473 U.S. at 165-68, 105 S.Ct. at 3105-06, 87 L. Ed. 2d at 121-23.

Considering the obiter dictum context of the Court of Appeals' statement and the confusing authority on which it relied, York does not seem a proper authority for the proposition that individuals may not be sued under Title VII in their individual capacities.

recovery against the individuals under [Title VII]." Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (citations omitted). See also Yates v. Avco Corp., 819 F. 2d 630, 633 (6th Cir. 1987) (noting that individual defendant did not appeal judgment against him); Romain v. Kurek, 772 F.2d 281, 283 (6th Cir. 1985) (individual defendant who was not named in EEOC charge should not have been dismissed if there was an "identity of interest" between him and corporate defendant; caption lists individual defendant as being sued "individually and in combination with [corporate defendant], jointly and severally").

Some district courts in the Sixth Circuit have squarely held that individual agents may only be sued under Title VII in their official capacities. In Lowry v. Clark, 843 F. Supp. 228 (E. D. Ky. 1994), the court entered summary judgment for an individual defendant on the grounds that the plaintiff had settled with the corporate defendant, thereby vitiating her claim against the individual defendant. Likewise, in Babb v. Bridgestone, No. 3-92-0695 (M.D. Tenn. February 23, 1993), and Brasfield v. Tennessee Alcoholic Beverage Comm'n, No. 3-92-0873 (M.D. Tenn. March 9, 1993), Judge Wiseman dismissed claims against the individual defendants in their individual capacities on the grounds that Title VII only permitted them to be sued in their official capacities. See also Williams v. Hevi-Duty Elec. Co. 668 F. Supp. 1062, 1070 (M.D. Tenn. 1986) (Morton, J.) rev'd on other grounds, 819 F.2d 620 (6th Cir.), cert. denied, 484 U.S. 970, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987) (individual defendant is not Title VII "employer" because the "employer...is the one against whom affirmative relief, including backpay, may be adjudged"). In at least one reported decision, a district court in this circuit has entered a judgment against an individual defendant. Compston v. Borden, Inc., 424 F. Supp. 157, 163 (S.D. Ohio 1976). Still others have refused to dismiss individual defendants without commenting whether they might be liable in their individual or official capacities. E.g., Fauser v. Memphis Housing Auth., 780 F. Supp. 1168 (W.D. Tenn. 1991); Robson v. Eva's Super

Market, Inc., 538 F. Supp. 857, 863 (N. D. Ohio 1982); Munford v. James T. Barnes & Co., 441 F. Supp. (E.D. Mich. 1977).

This Court thinks it makes little sense, in the context of Title VII, to speak of suits against individuals in their "official" or "individual" capacities. Identifying the capacity of an individual defendant is only relevant in suits against public officials presenting certain issues of Eleventh Amendment immunity,[9] official immunity,[10] or government liability for acts of government agents.[11] See Kentucky v. Graham, 473 U.S. at

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[9] The Eleventh Amendment forbids suits for money damages against state officials in their official capacities. Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356, 39 L.Ed. 2d 662, 272-73 (1974). However, it does not bar such suits against state officials in their individual capacities. Scheuer v. Rhodes, 416 U.S. 232, 237-38, 94 S.Ct. 1683, 1686-87, 40 L.Ed. 2d 90, 97-98 (1974); Foulks v. Ohio Dept. of Rehabilitation and Correction., 713 F.2d 1229, 1233 (6th Cir. 1983).

[10] When a government official is sued in his individual capacity, he is protected by a qualified immunity from liability based on his actions that do not violate clearly established law. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975). However, when he is sued in his official capacity, the suit is construed as on against the government entity itself, and no qualified immunity defense is available. Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

[11] For example, in a Section 1983 action, a municipality

165-68, 105 S.Ct. at 3105-06, 87 L.Ed.2d at 121-123. However, these issues are largely irrelevant in Title VII litigation.

First, the Eleventh Amendment is never a bar to Title VII actions. Fitzpatrick v. Bitzer 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976). Title VII was enacted pursuant to the Fourteenth Amendment, and therefore it trumps state immunity. Id.

Second, it would be extremely difficult for any Title VII defendant to successfully assert a defense of official immunity. In most cases, Title VII defendants are private employers, and there is simply no basis for an official immunity defense. In the narrow class of cases in which the defendant is a public official asserting official immunity, the official would have to demonstrate an objectively reasonable belief that his discriminatory actions did not violate clearly established law. See Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410-11 (1982).[12] But the

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is not vicariously liable for the constitutional torts of its employees because Section 1983 does not recognize respondeat superior. Monell v. New York City Dept. of Social Servs. 436 U.S. 658, 691-95, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611, 636-38 (1978). Therefore, in a suit for money damages against a municipal officer in his individual capacity, the plaintiff may only recover from the officer and not the municipality he serves. On the other hand, if the plaintiff sues the officer in his official capacity, the suit is really one against the municipality, and recovery may not be had from the officer.

[12] The Supreme court has never decided whether the official immunity defense is applicable in a Title VII action. However, the Court took a dim view of an employer's asserting the equitable defense of "good faith":

likelihood of ever succeding on such a theory is minimal because Title VII's prohibition against discrimination in employment is a law "of which any reasonable public official would be well aware." Fauser v. Memphis Housing Auth., 780 F. Supp. 1168, 1174 (W.D. Tenn. 1991). But see Hutchinson v. Lake Oswego School Dist. No. 7, 519 F. 2d 961 (9th Cir. 1975), vacated on other groungs, 429 U.S. 1033, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977) (school officials entitled to offical immunity despite having violated Title VII by denying sick leave to pregnat teacher). In any event, it seems a drastic and unfounded rule to eliminate liabilty of all individual Title VII defendants, private person and public officals alike, on the grounds that a few public officials might successfully assert official immunity.

Third, Title VII does hold goverment entities, as well as private employers, liable for the discriminatory acts of their agents. See Fitzpatrick v. Bitzer, 427 U.S. at 456-57, 96 S.Ct. at 2671-72, 49 L.Ed. 2d 622 (state liable for backpay and attorney's fees for Title VII violations by state offiials). In this

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> Where an employer has shown bad faith--by maintaining a practice which he knew to be illegal or of highly questionable legality--he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor...Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."

Albermarle Paper Co. v. Moody, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374, 45 L.Ed. 280, 299 (1975) (emphasis in original) (citations omitted).

respect, Title VII differs significantly from Section 1983, wheihc does not recognize vicari0us liability of goverment entites. See supra not 11.

The Supreme Court has stated that "Congress wanted courts to look to agency principles for guidance" in assigning liability for sexual harassment by employers' agents, Vinson, 477 U.S. at 72, 106 S.Ct. at 2408, 91 L.Ed2d at 63, and the Court refered generally to the Restatement (Second) of Agency for elaboration of agency principles, id. Accordingly, the Court of Appeals for the Sixth Circuit has relied on the Restatement in deciding when an employer is liable under Title VII for sexual harassment by its supervisory personnel. Kauffman, 970 F.2d at 184; Yates v. Avco, 819 F.2d at 630. As noted above, the Court of Appeals has not yet addressed the issue of whether the agent himself can every be personally liable, but the law of agency suggests that he can be. The Restatement provides: "Principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent..., and a judgment can be rendered against each." Restatement (Second) of Agency § 359C(1) (1957). Furthermore, if a plaintiff settles her claim against the principal but reserves her rights against the agent, the agent is not released from liability but is only entitled to a set-off of amounts paid by the pricipal. Id. § 359B(a); see also cases cited in id. Appendix.[13]

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[13]Following the settlement of claims against Wayne County and the Wayne County Sheriff's Department, Sheirff Nutt moved to have this action dismissed as to him on the grounds that agency law requires release of the agent upon release of the principal. See Memorandum (filed October 7, 1993; Docket Entry No. 59) in support of motion to dismiss at 2-3. The Court rejected the sheriff's argument as a misstatement of agency law. See Memorandum (entered December 2, 1993; Docket Entry No. 85). Sheriff Nutt never brought to the Court's attention the line of cases discussed

This court finds much of the analysis used by other courts in concluding that there is no individual liability under Title VII to be questionable. Principally, the distinction between defendants being sued in their "offical" and "individual" capcities seems misplaced in the Title VII context. Furthermore, the law of agency, on which courts have relied to determine employer liability for sexual harasment by the employer's agents, suggests that the agents themselves should liable.

Nevertheless, this Court cannot ignore what is obvious. The greatest weight of recent legal authority, including the holding of the courts of appeals of other circuits, other district courts in this circuit, and even other judges wihtin this district, does not recognize indivudal liability for Title VII violations. Without a clear statement to the contrary from the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court, this Court concludes that Title VII does not permit suits against indivudal defendants in their "individual capacties." Therefore, this action shall be dismissed with prejudice.

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above which hold the indiviudal may not be sued in their individual capacity under Title VII.

NOT RECOMMENDED FOR PUBLICATION

No. 94-5750

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WENDY LEE WILSON,	)	
STEVIE BURNS,	)	
	)	
Plaintiffs-Appellants,	)	ON APPEAL FROM THE
	)	UNITED STATES
v.	)	DISTRICT COURT FOR
	)	THE MIDDLE DISTRICT
LEON "BUDDY" NUTT,	)	OF TENNESSEE
Sheriff of Wayne County,	)	
Tennessee,	)	
	)	
Defendant-Appellee.	)	

Before: **MARTIN** and **SILER,** Circuit Judges; **JOINER,** District Judge.*

PER CURIAM. Plaintiffs appeal the district court's order dismissing their Title VII claims against Sheriff Leon "Buddy" Nutt, in his individual capacity. Based on the following discussion, we hold that Sheriff Nutt is liable in his official capacity, and remand to the district court.

I.

A. Factual History

Nutt was elected Sheriff of Wayne County in 1990.

*The Honorable Charles W. Joiner, United States District Judge for the Easter District of Michigan, sitting by designation.

According to plaintiffs' complaint, Nutt was the chief executive of the Wayne County Sheriff's Department, and supervised dispatchers and deputies, among others. During 1992, the sheriff's department employed fifteen or more employees for more than twenty weeks, including Nutt's chief deputy assistant but excluding Nutt.[1]

The claim arose from the employment of plaintiff Wendy Lee Wilson. She was forced to have sex with Nutt on July 13, 1992, while she was working as a dispatcher in the sheriff's office. After the incident, Wilson called plaintiff Stevie Burns, a deputy sheriff, at his home. Burns immediately reported the incident to an assistant district attorney. He then telephoned a sheriff's department employee to procure a rape-detection kit. He also called another dispatcher to fill in for Wilson.

Wilson never returned to work and received wages through July 14. She would have earned $396.42 if she had been paid through July 31, her original departure date. Burns was on family leave for the next week and appeared under subpoena before the Wayne County Grand Jury. He returned to work on July 22, and was discharged for purported "budget restrictions." He would have earned an additional $19,250 in wages if he had continued employment through the final day

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[1] Employers are subject to Title VII only if they have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

of trial, plus $5,500 if he would have worked through the last day of Sheriff's Nutt's term of office.

B. Procedural History

Wilson and Burns brought suit under Title VII against Wayne County, the Wayne County Sheriff's Department, and Sheriff Nutt. They settled their claims against Wayne County and the sheriff's department, and proceeded to trial against Sheriff Nutt.

Nutt moved to dismiss the case because, among other things, he purportedly could not be liable as an individual. The district court denied this motion, and the case went to trial After the evidence was heard, the district court determined that Sheriff Nutt had sexually harassed Wilson and that his termination of Burns was retaliatory. The court, however, then ruled that Nutt could not be held individually liable under Title VII as an employer.

II.

Title VII prohibits "employers" from discriminating based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. An "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees...and any **agent** of such person..." 42 U.S.C. § 2000e(b) (emphasis added). "Agent" is not defined by Title VII, but has been interpreted as "an individual who 'serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment.'" Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994) (quoting Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)).

The district court assumed that Sheriff Nutt was an agent of the Wayne County Sheriff's Department and thus

adjudicated whether an agent may be held liable in his individual capacity under Title VII. The court adopted the position of a majority of circuits holding that Title VII does not provide for individual liability.[2] The Sixth Circuit has not directly addressed this issue,[3] and we need not do so in this

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[2] See, e.g., Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), cert. denied, 115 S.Ct. 574 (1994); Sauers v. Salt Lake County, 1 F.3d 1122, 11125 (10th Cir. 1993); Miller v. Maxwell's Int'l, 991 F.2d 583, 587-88 (9th Cir. 1993), cert. denied, 114 S.Ct. 1049 (1994); Busby v. City of Orlando, 931 F. 2d 764, 722 (11th Cir. 1991); Harvey v. Blake, 931 F.2d 226, 227-28 (5th Cir. 1990); Padway v. Palches, 665 F. 2d 965 (9th Cir. 1982). Compare Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir.) (finding no Congressional intent of individual liability), cert. denied, 115 S.Ct. 666 (1994), with Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (finding that supervisory employee was "employer"), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990).

[3] Courts have cited Sixth Circuit cases for general support of both the majority and minority positions on the issue. None of these cited cases, however, deals directly with the questions of individual liability under Title VII. For example, in Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986), the court was deciding whether a Title VII suit was "vexatious" for purposes of attorney's fees, and stated" "the law is clear that individuals may be held liable ...as 'agents' of an employer under Title VII." The court in York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982), observed in dictum that a supervisory employee could

case. Based upon defendant's concessions and the nature of the office of sheriff in Tennessee, we hold that Nutt may be sued in his official capacity as Sheriff of Wayne County.

As Nutt states in his answer, "[t]he Sheriff of Wayne County holds a sui generis office authorized by Article 7 Section 1 of the Constitution of Tennessee, and is not a mere agent of the County."[4] Moreover, Nutt stated in his answer and at oral argument before this court that he was the "employer of both Wilson and Burns.

Even if Nutt is the plaintiffs' "employer," he only comes within the reach of Title VII if he "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The district court found that "[e]xcluding

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be "sued in his **official** capacity as executive director, i.e. agent, of the [defendant]..." (emphasis added). See also Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987) (noting that individual defendant did not appeal judgment against him); Romain v. Kurek, 772 F.2d 281, 283 (6th Cir. 1985) (stating that individual defendant who was not named in EEOC charge should not have been dismissed if there was "identity of interest" between him and corporate defendant).

[4] Article 7, Section 1 provides in part: "The qualified voters of each county shall elect for terms of four years...a Sheriff...[His] qualifications and duties shall be prescribed by the General Assembly."

the sheriff but including his chief deputy, there were fifteen or more employees on the payroll for twenty weeks in each of 1992 and 1993." Nut has argued that the chief deputy should not be counted as an employee because he purportedly serves on the sheriff's "personal staff." 42 U.S.C. § 2000e(f) (person chosen by elected official to serve on "personal staff" is excluded from Title VII's definition of "employee"). Exemptions to remedial status such as Title VII should be construed narrowly. See, e.g., Nichols v. Hurley, 921 F.2d 1101, 1103-04 (10th Cir. 1990). At trial, Nutt presented no evidence regarding the duties of the chief deputy. Accordingly, he has failed to show that the chief deputy should not be counted as an employee for purposes of Title VII. But see Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981) (undersheriff was member of personal staff).

In summary, Nutt is an "employer" for purposes of Title VII, and, thus, he may be sued in his official capacity as Sheriff of Wayne County. We **REMAND** the case for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

WENDY LEE WILSON and STEVIE BURNS	]	
	]	No. 1-92-0148
v.	]	Judge Higgins
	]	
LEON "BUDDY" NUTT	]	

MEMORANDUM

The United States Court of Appeals for the Sixth Circuit remanded this action by order filed December 27, 1995, finding that even though this Court had dismissed the claims against Sheriff Leon "Buddy" Nutt in his individual capacity, Sheriff Nutt was still an employer under Title VII and could be sued in his official capacity.

The Court has before it the defendant's renewed motion (filed February 29, 1996; Docket Entry No. 127) to dismiss, his memorandum (Docket Entry No. 128) in support, and the plaintiffs' response (filed March 12, 1996; Docket Entry No. 129).

For the reasons discussed below, the Court shall grant the defendant's renewed motion to dismiss.

I.

The facts arising out of this action have been detailed in the Court's memorandum entered May 25, 1994 (Docket Entry No. 110) and will not be repeated here. See Wilson v. Wayne County, 856 F. Supp. 1254, 1256-89 (M.D. Tenn. 1994). In essence, the plaintiffs, Wendy Wilson and Stevie Burns, brought claims against Wayne County, the Wayne County Sheriff's Department, and Sheriff Nutt, alleging that Sheriff Nutt had engaged in sexual harassment and retaliatory

discharge in violation of Title VII.[1] The plaintiffs later settled all claims against Wayne County and the Wayne County Sheriff's Department, and those parties were dismissed from the lawsuit. Order (entered October 8, 1993; Docket Entry No. 60).

After this settlement, Sheriff Nutt moved for dismissal. He argued that the plaintiffs had been compensated by their employer, Wayne County and the Wayne County Sheriff's Department, and thus they could not seek additional compensation from the employer's agent, Sheriff Nutt. Defendant's motion to dismiss and memorandum in support (filed October 7, 1993; Docket Entry Nos. 58 and 59). This Court denied the motion, finding that the principles of agency allowed recovery from both the principal and the agent when tortious conduct was involved. Order and memorandum (entered December 2, 1993; Docket Entry Nos. 84 and 85).

Subsequent to a bench trial, this Court found that Sheriff Nutt had subjected Ms. Wilson to both hostile environment and quid pro quo sexual harassment and had fired Mr. Burns in retaliation for opposing this harassment. Memorandum (entered May 25, 1994; Docket Entry No. 110). However, this Court then dismissed the action, stating:

> this Court cannot ignore what is obvious. The greatest weight of recent legal authority...does not recognize individual liability for Title VII

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[1] The Plaintiffs filed their Complaint on December 14, 1992, alleging sexual harassment and retaliatory discharge in violation of both Title VII and the Tennessee Human Rights Act, deprivation of constitutional rights in violation of 42 U.S.C. § 1983, and damages resulting from the common law torts of battery and outrageous conduct. The claims under the THRA, section 1983, and the common law were later dismissed as to Sheriff Nutt. See Docket Entry Nos. 48, 74 and 85.

> violations. Without a clear statement to the contrary from the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court, this Court concludes that Title VII does not permit suits against individual defendants in their "individual capacities."

Id. at 24.

On appeal, the Sixth Circuit referred to this Court's ruling against individual liability, but then stated "[t]he Sixth Circuit has not directly addressed this issue, and we need not do so in this case." See Mandate (filed in this District on January 2, 1996; Docket Entry No. 120) at 4. Instead, the Sixth Circuit found that Sheriff Nutt could be sued as an "employer" in his official capacity as the Sheriff of Wayne County and remanded the case for further proceedings. Id.

II.

Title VII imposes liability on "employers" and defines an employer as "a person engaged in an industry...who has fifteen or more employees...and any agent of such a person." 42 U.S.C. § 2000e(b). Under this definition, an individual employing over fifteen employees is subject to liability as an "employer." Any agent of such an employer is also liable, though only in his official capacity such that respondeat superior liability is imposed on the employer.[2] An agent may

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[2] The cases which deny individual liability under Title VII explain that Congress' purpose including this agent language in the definition of employer was to incorporate respondeat superior liability into the statute such that employers were liable for the unlawful conduct of their employees. See Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996); Williams v. Banning, 72 F.3d 552, 554 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995); Cross v. Alabama, 49 F.3d 1490, 1504

also be liable if he independently meets the definition of "employer." Grant v. Lone Star Co., 21 F. 3d 649, 652 (5th Cir.), cert. denied, 115 S.Ct. 574, 130 L.Ed. 2d 491 (1994). An individual can therefore be liable both as an agent in his official capacity and as an employer in his own right.

An example of such an individual is a representative of a political subdivision, such as a county department or agency. This individual could be sued in his official capacity as an agent of the county, or he could be sued as an employer in his own right if his department or agency employed fifteen or more employees and independently satisfied the definition of "employer."[3] While Sheriff Nutt would likewise qualify as both an agent and an employer, the plaintiffs' settlement with Wayne County and the Wayne County Sheriff's Department effectively negates both grounds of liability.[4]

(11th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.), cert. denied, 115 S.Ct. 574, 130 L.Ed. 2d 491 (1994); Miller v. Maxwell's Int'l, 991 F.2d 583, 587 (9th Cir. 1993), cert. denied, Miller v. La Rosa, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed. 2d 372 (1994); Wilson v. Wayne County, 856 F. Supp. 1254, 1264-1265 (M.D. Tenn. 1994).

[3] In this situation, where both the county and the county department satisfy the definition of employer, plaintiffs would probably choose to characterize the county as the employer since greater damages are allowed when the entity employs a greater number of employees. 42 U.S.C. § 1981a(3).

[4] The Sixth Circuit indicated that liability was imposed on Sheriff Nutt only in his capacity as an employer, not as an agent of Wayne County or the Wayne County Sheriff's Department. The Sixth Circuit reiterated Sheriff Nutt's contention that he was not "a mere agent of the County, " and that he admitted he was the "employer" of both Ms. Wilson and Mr. Burns.

A. Sheriff Nutt's Liability in His Official Capacity as an Agent

Finding Sheriff Nutt liable in his official capacity as an agent of his employer, whether the employer be Wayne County or the Wayne County Sheriff's Department, serves only to impose respondeat superior liability on that employer. As noted, however, both of these entities have already settled their liability with the plaintiffs, and this Court ordered all claims against them to be dismissed with prejudice. Order (Docket Entry No. 60). Dismissal with prejudice constitutes an adjudication of the merits of the controversy. Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 362 (6th Cir. 1967). Since any liability of Wayne County and the Wayne County Sheriff's Department has already been adjudicated, and since Sheriff Nutt cannot be individual liable as an agent, the Plaintiffs cannot recover anything further from Sheriff Nutt in his official capacity as an agent of either of these entities.

While this Court stated in an earlier memorandum that agency principles allowed recovery from both the principal and the agent when tortious conduct was involved, this ruling was issued before this Court decided that agents could not be individually liable under Title VII. Memorandum (Docket Entry No. 84). As a result of the decision denying individual

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Mandate (Docket Entry No. 120) at 5. The Sixth Circuit then explained that since Sheriff Nutt employed fifteen employees for the requisite number of weeks, he qualified as an "employer" for purposes of Title VII. Id.

The Sixth Circuit does state several times that Sheriff Nutt could be sued in his "official capacity" as the Sheriff of Wayne county. Id. at 1, 4 and 6. While such language suggest the liability of an agent in his official capacity, the Sixth Circuit never links this official capacity language with agency liability. In fact, the Sixth Circuit does not even employ agency principles in its ruling, but instead speaks only of Sheriff Nutt's status as an "employer."

liability, a plaintiff claiming violations of Title VII by and employer's agent can seek recourse only from the employer itself under a theory of respondeat superior. Once liability with that employer has been settled or adjudicated, it cannot be revisited.

B. Sheriff Nutt's Liability as an Employer

For Similar reasons, the plaintiffs' settlement with Wayne County and the Wayne County Sheriff's Department also resolved any liability of Sheriff Nutt as an employer in his own right. If the plaintiffs had settled only with Wayne County, Sheriff Nutt could still be liable as an "employer" since his department employed fifteen employees for the requisite number of weeks. However, the plaintiffs also settled with the Sheriff's Department. This Court cannot escape the reality that a suit against Sheriff Nutt as an employer is actually a suit against the Sheriff's Department. The fifteen employees which the Sixth Circuit found Sheriff Nutt employed such that he satisfied the definition of "employer" were all employees of the Sheriff's Department; Sheriff Nutt did not hire these people for some other separate entity. This Court finds no distinction between a suit against Sheriff Nutt as an employer and a suit against the Wayne County Sheriff's Department.[5] Accordingly, having settled with the Sheriff's Department, the plaintiffs have effectively settled with Sheriff Nutt in his official capacity as an employer.

III.

Since any liability of Wayne county and the Wayne

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[5] Sheriff Nutt petitioned the Sixth Circuit for a hearing on this issue. Notice (filed June 7, 1996; Docket Entry No. 133). He argued that a suit against a government officer in his official capacity was actually a suit against the government body which that officer represents, thus the case should be dismissed since the liability of the Sheriff's Department had already been settled. This petition to rehear was denied. Id.

County Sheriff's Department has been adjudicated, no further recovery can be had by the plaintiffs against Sheriff Nutt as either an agent or an employer. For the reasons given in this memorandum, the court shall grant the defendant's renewed motion to dismiss.

An appropriate order will be entered.

Thomas A. Higgins
United States District Judge

Supreme Court, U.S.
FILED
JUL 9 1998
OFFICE OF THE CLERK

No. 97-1740

In The

Supreme Court of the United States

October Term, 1997

WENDY LEE WILSON
and STEVIE BURNS,

Petitioners,

versus

LEON "Buddy" NUTT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can a supervisor or agent of an employer be held liable as an individual pursuant to Title VII, 42 U.S.C. § 2000e(b) after Plaintiffs have settled the case with the employer agency?

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STATEMENT OF THE CASE

In 1992, Petitioner Wendy Wilson was employed as a dispatcher for the Wayne County Sheriff's Department. Petitioner Stevie Burns was also employed by Wayne County as an officer with alternate duties of both dispatcher and deputy. Petitioner Wilson was hired with the understanding she would be leaving the position on July 31 to attend school. When she later changed her mind and requested to stay with the Sheriff's office, Respondent Nutt explained that her replacement had already been hired, but that she might be able to work on a part-time basis. He made no suggestions during any conversation with Petitioner regarding an exchange of sexual favors for an extension of her job period.

On July 13, 1992, Sheriff Nutt called Petitioner Wilson to his office and made sexual advances toward her. By Petitioner's own admission, she made no verbal objection and did not resist. The two had sex in the Sheriff's office. Further,

> Sheriff Nutt never threatened Ms. Wilson, nor did he explicitly offer her any reward, such as continued employment, in exchange for sexual favors. The sheriff's son was asleep in the living quarters, just a few yards from the office, during the entire time Ms. Wilson and the sheriff were inside. Had Ms. Wilson called out, the son would have heard. *Wendy Lee Wilson v. Wayne County*, 856 F. Supp. 1254 (M.D. Tenn. 1994) (A-9 of Petitioners' Brief).

Petitioner Wilson then reported the incident as a rape after discussing the matter with her boyfriend Petitioner Burns. It was Petitioner Burns who actually reported the

incident, both to his supervisor, Sergeant Charles Crosslin, and to the district attorney's office. The grand jury did not indict Respondent on these charges. Petitioner Wilson chose not to complete her work term, and Petitioner Burns was later discharged.

Pursuant to Title VII, 42 U.S.C. § 2000e, Petitioners filed suit against Wayne County, the Wayne County Sheriff's Department and Sheriff Leon Nutt, alleging sexual discrimination and retaliatory discharge. Petitioners accepted and received settlement for their claims from Wayne County and the Wayne County Sheriff's Department and signed a corresponding release form. Respondent Nutt moved for dismissal based on the settlement, and, following a bench trial, the district court dismissed the action in accordance with the current majority holding of the Circuit Courts that there is no individual liability under Title VII. Petitioners appealed to the Sixth Circuit Court which held that Respondent could be sued in his "official capacity as Sheriff of Wayne County" and remanded the cause to the District Court. The District Court, again bowing to the "greatest weight of recent legal authority," dismissed the action with prejudice, on the ground that Title VII does not allow for individual liability. Petitioners again appealed to the Court of Appeals for the Sixth Circuit, raising the issue of Sheriff Nutt's liability in both his individual and his official capacity. Shortly before hearing the case, the Sixth Circuit had issued an opinion that no individual liability exists under Title VII, making it the ninth of twelve circuits to hold such an opinion. *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997). In keeping with the *Wathen* ruling, the Sixth Circuit held that Sheriff Nutt could not

be held liable in an individual capacity, and based on the release signed by Petitioners, he could not be held liable in his official capacity. Accordingly, the Sixth Circuit affirmed the District Court's dismissal of the case.

ARGUMENT

Seeking a means of heaping additional liability on Respondent, Petitioners argue that this Court should grant a writ of certiorari and decide the issue of individual liability under Title VII because the courts of appeal "have not been able to agree." (Petitioner's brief, p. 9) However, they concede that of the twelve circuits, nine have agreed that there is no individual liability and two have not yet addressed the issue. (See *Tomka v. Seiler Corp.*, 66 F.3rd 1295 (2d Cir. 1995), *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994), *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997), *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), *Haynes v. Williams*, 88 F.3d 898 (10th Cir. 1996), *Cross v. State of Alabama*, 49 F.3d 1490 (11th Cir. 1995) and *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995)). Only the Fourth Circuit has held that individual liability may exist for some narrowly defined supervisory employees. *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989). However, even the Fourth Circuit Court appears to be joining the majority opinion that individual liability is not appropriate under Title VII. Five years after *Paroline*, in *Birkbeck v. Marvel Lighting Corp.*, the Fourth Circuit refused to apply individual liability in an age discrimination case. 30 F.3d 507 (4th Cir. 1994). In its interpretation of the Age Discrimination in

Employment Act (ADEA), the Court relied heavily on *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), a Ninth Circuit Court case determining that individual liability was not proper under Title VII. The Court reasoned that the two acts were similar in that Title VII applies only to employers of fifteen or more and the ADEA applies only to employers of twenty or more. The Court explained that the purpose of the minimum employee threshold could "only be to reduce the burden of the ADEA on small business" and that it "would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more." *Birkbeck*, 30 F.3d 507, 510. Especially indicative of the Fourth Circuit's opinion that individual liability does not exist under Title VII was this statement: "Employer liability ensures that no employee can violate the civil rights laws with impunity, a safeguard that has proven sufficient with respect to Title VII, the ADEA's closest statutory kin." Thus, the Circuits can hardly be said to be in a heated controversy over this issue. An examination of the some of the various circuit cases reflects the unity of their holdings and analysis.

One of the leading cases on this issue is *Miller v. Maxwell's Intern, Inc.*, in which Plaintiff Miller had brought a Title VII claim against her employer Maxwell's Intern, Inc., as well as several individual employees. 991 F.2d 583 (9th Cir. 1993). Following settlement with her employer, Maxwell's, Plaintiff attempted to maintain her action against the various employees as individuals. Rejecting Plaintiff's statutory construction argument

regarding the agent clause, the Court reasoned that "the obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute." *Miller*, 991 F.2d 583, 587, quoting the district court below. In reaching its decision, the Court considered that Congress had limited the application of Title VII to employers of fifteen or more employees so as to lessen the financial burden on small entities. To then apply that same burden to an individual would be incongruent. The *Miller* case exemplifies the interpretive conflict in the present case. The question is whether the phrase "and any agent of such a person" at the end of the definition of "employer" in 42 U.S.C. § 2000e means that individual agents are intended to bear the same liability as their business employers or that a business employer must take responsibility for the discriminatory actions of its agents. Respondent would argue, in conjunction with nine of the ten circuits which have addressed this issue, that the latter interpretation is correct.

Petitioners suggest that the nine circuit courts which have held against individual liability have approached the language of Title VII in an "overly simplistic" manner. (Petitioners' Brief, p. 10). Respondent would suggest that Petitioners are too simplistic in their approach to the statute by limiting its interpretation to the surface meaning of the agent clause. The Second Circuit Court in *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995), considered such a literal interpretation too "narrow," leading to results "Congress would never have contemplated." Building on the reasoning of *Miller*, the *Tomka* court took great pains to thoroughly investigate the legislative history of Title VII in determining Congressional intent. It

first considered the floor debate in which congressional members discussed the minimum employee threshold and various burdens imposed on businesses by Title VII liability. Had Congress been willing to place the full brunt of Title VII liability on an individual, it would not have limited its application to businesses of fifteen or more employees. Of additional importance to the *Tomka* court was the complete absence of discussion of the effect of liability on *individuals* as agents of the employer, a fact not disputed by Petitioners. Additional evidence of congressional intent is the damages scheme placing caps on liability in accordance with the size of the employer. (42 U.S.C. § 1981a) Obviously, Congress was attempting to proportion the potential liability with the resources of the business-employer. The damages scheme loses all relevance and effectiveness in the face of individual liability. As the Courts in both *Miller* and *Tomka* pointed out, it makes no sense for Congress to protect businesses based on size, while leaving an individual fully exposed to liability. *Miller,* 991 F.2d 583, 587 and *Tomka,* 66 F.3d 1295, 1314. Petitioners fail to create even a weak argument against this reasoning, and state that "one can only speculate as to [the] purpose" of the liability caps. (Petitioners' Brief, p. 15).

The damages scheme was of particular importance to the Third Circuit Court in *Sheridan v. E.I. Dupont de Nemours and Company*. 100 F.3d 1061 (3rd Cir. 1996). The Court reasoned that the 1991 statutory amendment to Title VII, establishing a "detailed" sliding scale of damages for employers of fifteen or more but making no similar provisions for individuals was indicative that Congress never

intended individual liability. For the Court, the amendment "strongly suggests that Congress did not contemplate that such damages would be assessed against individuals who are not themselves the employing entity." *Sheridan*, 100 F.3d 1061, 1077.

Gary v. Long, a District of Columbia Circuit case, involved a Title VII claim following the Plaintiff employee Gary's rape by Defendant supervisor Long. 59 F.3d 1391 (D.C. Cir. 1995). The Court held that Defendant Long could not be held liable in his personal capacity under Title VII; rather, as the employer's agent, Plaintiff Gary's claim against Long "merged" with her claim against the employer agency. *Gary*, 59 F.3d 1391, 1399. Because all claims against the employer agency had been dismissed, Plaintiff Gary no longer had a cause of action against Defendant Long as an individual. In reaching its decision the Court expressly rejected Plaintiff's argument that under the "plain and unambiguous language" of the statute an individual agent qualifies as an employer for Title VII purposes. *Id.* The *Gary* case is identical to that of Petitioners; they have released the agency employer and no longer have a claim against the employee as an individual.

CONCLUSION

Petitioners, having settled and released all claims against Wayne County and the Wayne County Sheriff's Department, have waived all rights against Respondent in his official capacity. Therefore, the only remaining

cause of action against him must be brought in his individual capacity. At issue in this case is not the judgment, personality or morality of Defendant Nutt. At issue in this case is the appropriate interpretation and application of Title VII as regards *all* individual defendants. The vast majority of the circuits are in agreement that the individual liability sought by Petitioners is inappropriate. Congress has clearly demonstrated its intent, in congressional debate and in the construction of the statute itself, both originally and in later amendments, that individual liability not be within the scope of Title VII. Therefore, Respondent would respectfully request that writ be denied in this case.

Respectfully submitted,

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